SUPREME COURT OF THE STATE OF WASHINGTON

AUTOMOTIVE UNITED TRADES ORGANIZATION,

Appellant,

V.

STATE OF WASHINGTON, CHRISTINE GREGOIRE, LIZ LUCE,

Respondents.

RESPONDENT STATE OF WASHINGTON'S BRIEF

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ORIGINAL

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I. INTRODUCTION

This case arises from the furrow of well plowed precedent governing the legal effect of tribal sovereign immunity on motions to dismiss under CR 19. When a tribe is a necessary and indispensible party to a lawsuit, but cannot be joined because of tribal sovereign immunity, the trial court is within its discretion to dismiss the lawsuit. *Matheson v. Gregoire*, 139 Wn. App. 624, 634, 161 P.3d 486 (2007), review denied 163 Wn.2d 1020, 180 P.3d 1292 (2008), cert. denied 129 S. Ct. 197, 172 L. Ed. 2d 140 (2008); *Mudarri v. State*, 147 Wn. App. 590, 196 P.3d 153 (2008), review denied 166 Wn.2d 1003, 208 P.3d 1123 (2009). Federal authorities are consistent with Washington law in dismissing lawsuits under Fed. R. Civ. P. 19 when tribal immunity prevents joinder of a tribe to a lawsuit impacting tribal contractual interests. *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005), cert. denied, 546 U.S. 1173, 126 S. Ct. 1338, 164 L. Ed. 2d 53 (2006) (citing numerous cases).

Appellant Automotive United Trades Organization (AUTO), a group of non-tribal fuel retailers and business competitors of the tribes, claims that fuel tax refunds made to the tribes pursuant to state-tribal agreements violate the Washington Constitution. AUTO seeks an injunction prohibiting the State from paying the fuel tax refunds to the tribes as mandated by the Agreements. AUTO named as defendants the

State officials who executed the Agreements, but because the tribes have sovereign immunity, did not name the tribes.

The inability to join the tribes is fatal to AUTO's attempt to enjoin the contractually required fuel tax refunds because under Washington law:

In actions involving contractual rights, all parties to the contract are indispensible.

Aungst v. Roberts Construction Co., Inc., 95 Wn.2d 439, 443, 625 P.2d 167 (1981). Accordingly, the trial court did not abuse its discretion in dismissing AUTO's lawsuit, finding that the tribes were necessary and indispensible parties because the relief sought in the lawsuit would impact the contractual interests of the tribes. Matheson, 139 Wn. App. at 634; Mudarri, 147 Wn. App. at 596.

AUTO, unable to mount a credible legal argument in the face of overwhelming precedent requiring dismissal of its lawsuit, now turns to a lengthy recitation of how unfair it is for its case to suffer the consequences inherent to the recognition of tribal sovereign immunity. But courts have long understood that one of the consequences of recognizing any form of immunity (sovereign, judicial, executive, etc.) is the shielding of some controversies from judicial review. Thus, where immunity has been recognized, it is a reflection of a policy decision that the considerations

¹ Beyond unfairness, AUTO also makes exaggerated and implausible assertions that the dismissal of its lawsuit will give license to the governor to commit all manner of atrocities under the cloak of tribal immunity. Brief of Appellant (Br. Appellant) at 1-2.

underlying that immunity outweigh the unfairness of barring judicial resolution of a controversy. As stated by the court in *Hodel*:

[I]mmunity doctrines inevitably carry within them the seeds of occasional inequities... Nonetheless, the doctrine of tribal immunity reflects a societal decision that tribal autonomy predominates over other interests.

Wichita & Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 781 (D.C. Cir. 1986).

AUTO's remedy lies with the source of the agreements it complains so bitterly about - the Legislature. Indeed, during the last legislative session a bill was introduced that would legislatively provide the relief that AUTO is simultaneously asking the judiciary to provide. *See* House Bill 2013 (2011).² AUTO's conclusion that it will have no remedy if this case is dismissed is overstated. More accurately, AUTO will not have its preferred remedy.

The Legislature did not accept the offer of HB 2013 to substantially reform the state's fuel tax agreements with the tribes. Perhaps in future sessions AUTO can convince the Legislature that in light of *Wagnon*,³ the State could prevail in a hard line litigation posture and renounce its decision to settle the long running fuel tax disputes with the tribes.

http://apps.leg.wa.gov/documents/billdocs/2011.
 Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 126 S. Ct. 676, 163
 L. Ed. 2d 629 (2005).

As detailed below, there have been many situations similar to this case in which courts have found it necessary to dismiss a lawsuit due to the inability to bring a sovereign entity into court. The trial court was well within established precedent in ordering the dismissal of this lawsuit under CR 19 and should therefore be affirmed. *Matheson*, 139 Wn. App. at 634; *Mudarri*, 147 Wn. App. at 595; *Wilbur*, 423 F.3d at 1113.

II. COUNTERSTATEMENT OF FACTS

A. State-Tribal Fuel Tax Agreements

The state of Washington and the Indian tribes located in Washington have a lengthy history of contentious disputes regarding the State's authority to tax motor vehicle fuel and other fuel sold by and to the tribes, tribal members, and tribal fuel retailers. *See, e.g.,* former RCW 82.36.450 (1995); CP at 315-16. In an effort to begin resolving the ongoing conflicts, the Legislature authorized the State to enter into agreements with the tribes regarding the "imposition, collection and use of [the] state's motor vehicle fuel tax, or the budgeting or use of moneys in lieu thereof. . . ." Former RCW 82.36.450 (1995). Between 1995 and 2007, the State entered into fuel tax agreements (the Agreements) with five tribes. CP at 104.

In 2007, in response to further litigation with the tribes, the Legislature amended the statutory regime governing fuel taxation,

including the provisions authorizing the Agreements. CP at 17-54, 103; Laws of 2007, ch. 515. These changes impose additional requirements on the tribes who enter into agreements with the State. RCW 82.36.450(3); 82.38.310(3). Since 2007, the State has entered into agreements with an additional fourteen tribes. CP at 104, 158-79, 183.

Most of the Agreements provide that the State will refund to the tribe 75 percent of the state fuel taxes on each gallon of fuel purchased by the tribes or tribal retailers. CP at 104, 163, 175, 183. In exchange, the Agreements require the tribes to: (1) purchase fuel only from entities licensed by the State; (2) purchase only fuel on which state taxes have been paid; (3) pass the state fuel taxes on to retail customers in the price of fuel sold by the tribes; (4) arrange an annual audit demonstrating compliance with the agreed provisions; and (5) abide by certain record-keeping requirements to ensure compliance with the terms of the Agreements. CP at 105-06, 163-64, 174-76. As noted in the 2009 Tribal Fuel Tax Agreement Report, the tribes spent the fuel tax funds on road construction and maintenance, signal and traffic control, transportation planning, and police and public safety services. CP at 309-11.

⁴ AUTO complains that the audits of tax records are not subject to a public records request. Br. Appellant at 7-8. Discovery of taxpayer information is typically exempt from disclosure under the public records act and the tribes' information is treated no differently than other taxpayers in this respect. *See, e.g.*, RCW 82.36.450(4), citing RCW 42.56.230(3)(b).

The payment to the tribe is a refund because the tribe pays the state fuel tax in the price of the fuel purchased from a distributor. CP at 163 (tribe agrees to buy only fuel on which state fuel tax has been paid and to pass the tax on to the consumer). The refund is paid to the tribe, not to tribal retailers, and the tribe must spend the refund on highway related projects as described in the Agreements. RCW 82.36.450(3)(b); 82.38.310(3)(b); CP at 164, 175.

Highway related projects are broadly defined to include "planning, construction, and maintenance of roads, bridges, and boat ramps; transit services and facilities; transportation planning; [and] police services." *Id.* Approximately \$14.3 million in 2008 and \$23 million in 2009 were disbursed to the tribes pursuant to the Agreements. CP at 106.

B. The Parties And Proceedings Below

Appellant and plaintiff below, AUTO, is a trade association of gasoline and automotive services retailers. CP at 101-02. AUTO's members are business competitors of tribal fuel retailers. CP at 102.

Based on its unsubstantiated impression that tribal retailers are using the fuel tax agreements to gain a competitive advantage, AUTO filed this action against Governor Christine Gregoire and Liz Luce, the Director of the Department of Licensing (DOL) to enjoin the State from

paying fuel tax refunds to the tribes as required by the Agreements. CP at 100-02. .5

C. Prior Proceedings

AUTO's complaint alleged the partial refund of state fuel tax monies to the tribes as required by the Agreements violate the state constitution. CP at 343. The relief sought by AUTO is an injunction preventing the state from paying the refunds to the tribes. CP at 360.

AUTO's constitutional claims rest largely on its belief that tribes have spent some of the refunds on "non-highway purposes." Br. Appellant at 8-9. This is incorrect. Notably, prior to dismissal, the state produced records in response to AUTO's requests for discovery. Even with that production in hand, AUTO has never identified expenditures of fuel tax refunds that were beyond the scope of the

⁵ AUTO also seeks a writ of prohibition against Governor Gregoire and Director Luce. However, the effect of the writ, if granted, is the same as the injunctive relief sought by AUTO. CP at 114-18.

AUTO alleges that some of the expenditures were for "non-highway purposes." Br. Appellant at 8-9. However, this is incorrect. Even the very small number of transactions questioned by AUTO fall within the definition. For example, the Squaxin's use of fuel tax funds to repair a boat ramp is consistent with the statute's allowance of funding expenditures for the "maintenance of . . . boat ramps." RCW 82.36.450(3)(b); 82.38.310(3)(b). In addition, with regard to other expenditures, AUTO distorts the record. For example, AUTO notes the Skokomish used fuel tax dollars for its Public Works Department. Br. Appellant at 8. However, a portion of the record not cited by AUTO indicates that the Public Works Department is the Skokomish agency responsible for road maintenance. CP at 300, 310 ("Fuel taxes also provide the Tribe's Public Works Department the resources to maintain and repair our extremely aged road equipment like the dump truck, snow plows and backhoe."). This, obviously, falls within the definition of "highway-related purpose." RCW 82.36.450(3)(b); 82.38.310(3)(b).

agreements. More importantly, AUTO never presented an argument explaining why an improper expenditure by a tribe would obviate the impact of tribal sovereign immunity or the CR 19 analysis.

State defendants moved in the trial court to dismiss the action pursuant to CR 12(b)(7) and 19. CP at 378-79. Specifically, the State pointed to a long line of cases holding that tribes are necessary and indispensable parties to any suit that may impact the contractual rights of a tribe. CP at 386-99 (and cases cited therein). Relying on these cases, the State argued the tribes are necessary and indispensable parties to this action because AUTO's relief, if granted, would deprive the tribes of the fuel tax remittances that the Agreements guarantee to them. *Id.* The trial court agreed and, finding the tribes have not waived their sovereign immunity, dismissed the action with the proviso that AUTO would be allowed to amend the complaint and join tribal officials if a legal basis for that joinder could be shown. CP at 231-32.

AUTO then moved to amend the complaint to add as defendants those tribal officials who signed the Fuel Tax Agreements with the State. CP at 233, 242-45. The tribal officials were named as defendants for their actions in signing Agreements on behalf of their respective tribe. CP at 349. The State opposed the motion on grounds that the attempt to join tribal officials for actions taken in their official capacity was futile due to

tribal sovereign immunity when only state law claims are at issue. CP at 362-68.⁷ The trial court agreed and denied the motion to amend. CP at 369.

AUTO appeals the trial court ruling denying joinder of tribal officials. AUTO also appeals the finding of the trial court that the tribes are necessary and indispensible parties to this case that cannot be joined due to tribal sovereign immunity and, accordingly, that this case should be dismissed under CR 19.

III. ARGUMENT

A. Standard Of Review Of Trial Court's Dismissal Of This Action And Analytical Framework Of CR 19

Dismissal of an action under CR 12(b)(7) and CR 19 is "employed sparingly." *Matheson*, 139 Wn. App. at 634. However, where a court has dismissed an action on the basis of those rules, the decision will only be overturned on appeal if the trial court abused its discretion. *Id.* at 633-34.

CR 19 constructs a two-part legal framework to determine whether an action should be dismissed for failure to join an absent party. First, the court must determine if the absent party is necessary. CR 19(a). Second, if the party is necessary, the court must determine whether the party is indispensible thereby subjecting the case to dismissal if the absent party

⁷ AUTO voluntarily dismissed its federal claim in order to defeat the State's removal of the lawsuit to federal court. CP at 188-91.

cannot be joined. CR 19(b). *Matheson*, 139 Wn. App. at 634. As demonstrated below, the trial court did not abuse its discretion in answering both prongs of the CR 19 test affirmatively, concluding that sovereign immunity prevented joinder of the tribes, and dismissing the case.

B. The Trial Court's Decision To Dismiss This Case Under CR 19 Follows Established Washington Law

In two recent cases, Washington courts have upheld the CR 19 dismissal of cases strikingly similar to AUTO's case in which tribal sovereign immunity prevented joinder of an Indian tribe. *Matheson*, 139 Wn. App. at 634; and *Mudarri*, 147 Wn. App. at 590. Both *Matheson* and *Mudarri* involved challenges to state/tribal agreements by non-parties to the agreements. In both cases tribal immunity resulted in dismissal of the action due to the tribes being necessary and indispensible parties to the lawsuit.

AUTO fails to distinguish either *Matheson* or *Mudarri* in any significant way. For example, *Matheson* involved a suit filed by a tribal member and cigarette retailer against the state seeking the effective nullification of an agreement between the state and the Puyallup Tribe regarding cigarette taxes. *Matheson*, 139 Wn. App. at 627-28. The cigarette tax agreement was authorized by a statutory framework similar to

that challenged in this matter. *Compare*, RCW 43.06.465 with RCW 82.36.450 and 82.38.310. The cigarette tax and fuel tax agreements are similar as well, with the cigarette agreement providing the Puyallup with 70 percent of the revenue derived from tribal cigarette taxes, in return for the Tribe's commitment to peg the tribal cigarette tax at the same level as the state tax and to buy cigarettes only from State-licensees. *Matheson*, 139 Wn. App. at 627-28.

The court of appeals affirmed the trial court's dismissal of the action on CR 19 grounds. Specifically, the court concluded the Puyallup Tribe was a necessary party to the dispute because it was a party to the contract that the litigation effectively sought to abolish. *Matheson*, 139 Wn. App. at 635. In addition, the court found the Puyallup Tribe could not be joined because of its sovereign immunity. The court concluded that although dismissal would result in plaintiff having no judicial remedy or forum for his complaint, courts have routinely "held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for plaintiffs." *Id.* at 636.

Matheson was followed by Mudarri v. State, 147 Wn. App. 590, 196 P.3d 153 (2009), which involved challenges to an agreement signed between the State and the Puyallup Tribe permitting the Tribe to operate electronic scratch ticket games. *Id.*, 147 Wn. App. at 597. Similar to

AUTO in this case, Mudarri was a non-tribal business competitor who operated a casino but was not authorized to provide electronic scratch ticket games. *Id.* Mr. Mudarri sued the State, but not the Puyallup Tribe.

Unlike the plaintiff in *Matheson* who directly challenged the state-tribal agreement, *Mudarri* indirectly attacked the state-tribe gaming agreement by alleging it violated various constitutional doctrines (e.g., separation of powers) and the state constitution. *Id.* at 595. *Mudarri's* indirect challenges are similar to AUTO's state constitutional challenges.

The court of appeals affirmed the dismissal of Mudarri's indirect challenges on CR 19 grounds. *Id.* at 605-09. The court found the Puyallup Tribe to be a necessary party to any action seeking to invalidate a contract to which the tribe is a party. *Id.* at 604. In addition, the court found that because of the tribe's sovereign immunity, *Mudarri's* claims could not adequately be addressed and the matter should therefore be dismissed. *Id.* at 605.

The court stressed that the CR 19 analysis applied just as equally to bar indirect challenges as direct challenges, noting:

Just as the Tribe did not waive its sovereign immunity from suit on Mudarri's direct challenge to the State-Tribe Compact, it neither waived its immunity nor consented to be sued on these claims related to and, thus, indirectly attacking the State-Tribe Compact. Because the Tribe could not be joined as a party, the trial court could have recited failure to join an indispensable party under CR

12(b)(7) and 19(b) as a ground for dismissing Mudarri's other claims indirectly related to the State-Tribe Compact. . . . [W]e affirm their dismissal on alternative CR 19(b) grounds.

Id. at 606-07.

The decisions in *Matheson* and *Mudarri* correctly analyze the impact of tribal immunity on CR 19 when a tribe is a necessary and indispensible party to a lawsuit. AUTO provides no distinction that is material to a CR 19 analysis between its claims and the functionally identical decisions in *Matheson* and *Mudarri*. The specific application of CR 19 to this case is discussed below and demonstrates the ruling of the trial court followed well established law and was not an abuse of discretion.

- C. The Application Of CR 19 To This Case Demonstrates That The Absent Tribes Are Necessary And Indispensible Parties That Cannot Be Joined Due To Tribal Sovereign Immunity, And That The Case Was Properly Dismissed
 - 1. The Absent Tribes Are Necessary Parties In This Dispute

Whether a party is necessary under CR 19(a) focuses on whether the absent party has a legally protected interest relating to the action. An absent party is necessary if adjudication of the matter in the party's absence "may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject

to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." CR 19(a)(2).

For purposes of CR 19(a)(2)(A) under Washington law, proof of actual impairment of an absent party's interest is not required. An absent party is deemed necessary as long as the requested relief "may" impair their interests. *Burt v. Dep't of Corrections*, 168 Wn.2d 828, 833, 231 P.3d 191 (2010). In this case, the relief requested is an injunction barring the fuel tax refunds to the tribes as required by the terms of the agreements. CP at 15.

Enjoining the tribes' contractual right to fuel tax refunds would clearly impair a key benefit the tribes receive from the Agreements. An impact on tribal contract rights has repeatedly been held to satisfy CR 19(a)(2)(A) and render the absent tribes necessary parties to the litigation. *Matheson*, 139 Wn. App. at 635; *Mudarri*, 147 Wn. App. at 604. As the *Wilbur* court noted:

The instant litigation threatens to impair the Tribe's contractual interests, and . . . its fundamental economic relationship with the State." As we stated in *Dawavendewa*, it is a "fundamental principle" that "a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract.

Wilbur, 423 F.3d at 1113, quoting Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1157 (9th Cir. 2002).

The legally protected interest at stake in this matter is the tribes' right to fuel tax revenues guaranteed to them by the Agreements. Courts have consistently found economic interests, such as the fuel tax revenues in this matter, are legally protected interests within the meaning of the CR 19(a) necessary party analysis. *See, e.g., Mudarri,* 147 Wn. App. at 606 (cigarette tax revenues); *Matheson,* 139 Wn. App. at 635 (gaming revenues); *Wilbur,* 423 F.3d at 1112-13 (cigarette tax revenues); *American Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1022-24, 305 F.3d 1015, 1022-24 (9th Cir. 2002) (gaming revenues).

AUTO's arguments that the tribes are not necessary parties under CR 19(a)(2)(A) fall woefully short. At the outset, it is specious to argue the State could adequately represent both the state and the tribes in a dispute over whether the state can pay fuel tax refunds to the tribes. This contention erroneously conflates a state/tribal alignment of interests for purposes of CR 19 with an illusory alignment of interests on the underlying merits of plaintiffs claim. Similar attempts to avoid the necessity of tribal joinder by conflating state and tribal interests have been expressly rejected. *Wilbur*, 423 F.3d at 1113 (citing cases).⁸

⁸ AUTO's impugning of the tribes at p. 17, n.11 is unwarranted. It is undisputed that tribes pay the state fuel tax when fuel is pulled off the rack just like every other fuel retailer. See CP at 163. The 75 percent refund reflects the compromise over whether the state can collect any state fuel tax from a tribe.

In the face of *Matheson, Mudarri*, and *Wilbur*, AUTO cites two inapposite cases in arguing that a mere financial interest is not enough to be considered a necessary party under Fed. R. Civ. P. 19(a). Br. Appellant at 17-18. Regarding AUTO's reliance on *Makah v. Verity*, the holding in *Makah* is precisely the opposite of AUTO's representation. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990). In *Makah*, the Ninth Circuit specifically held the Makah Tribe to be a necessary and indispensible party to adjustments in fishing quotas (the Makah's financial interest) that would affect the tribes' treaty harvest rights. *Makah*, 910 F.2d at 559.9

Second, AUTO cites Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California, 547 F.3d 962, 973 (9th Cir. 2008), as support for its argument that a mere financial interest does not qualify a party as necessary under CR 19(a)(2)(A). Br. Appellant at 17. In Colusa, the Ninth Circuit held a gaming compact dispute between the Colusa Tribe and the state of California over the maximum number of gaming devices that could be operated by the Colusa Tribe did not make any of the other 62 California tribes necessary parties to litigation simply because other

⁹ In a portion of the *Makah* decision unrelated to having a financial interest in a contract, the Ninth Circuit noted the tribe would not be necessary to the extent the relief challenged the application of agency procedural rules in future cases. *Makah*, 662 F.2d at 559.

tribes also had similar gaming compacts with California. *Colusa*, 547 F.3d at 973.

The situation in *Colusa* is easily distinguishable from the case before this court. In *Colusa*, the absent tribes were not parties to the compact in dispute between the Colusa and California. In this case, the absent tribes are parties to the fuel tax agreements at issue. Further, in *Colusa*, the Ninth Circuit held the indirect effect on other tribes by the mere precedence of resolving the Colusa dispute was insufficient to mandate the joinder of other tribes. *Colusa*, 547 F.3d at 972-73. By contrast in this case, the relief sought will directly affect the absent tribes because the aim of the lawsuit is to enjoin refunds to be paid to the tribes. *See Mudarri*, 147 Wn. App. at 604; *Wilbur*, 423 F.3d at 1113.

AUTO next turns to a New Mexico decision, *State ex rel. Clark v. Johnson*, 904 P.2d 11 (1995), to avoid the application of Washington decisions in *Matheson* and *Mudarri*. Br. Appellant at 19. AUTO's reliance on *Johnson* is misplaced. *Johnson* involved a mandamus action challenging the authority of the governor of New Mexico to enter into gaming compacts with various tribes without legislative authorization. *Id.* at 19.

The New Mexico *Johnson* decision is inapposite since the Agreements in this case were expressly authorized by the Legislature.

RCW 82.36.450. Unlike *Johnson*, this case is not about the authority of the governor to act without legislative authority. AUTO is not challenging the authority of the State defendants to enter into Agreements with tribes, but rather the payments made to the tribes that are required by the express terms of the Agreements.¹⁰

Indeed, the New Mexico Supreme Court subsequently limited *Johnson* and rejected an argument based on *Johnson* that is identical to that advanced by AUTO. *Srader v. Verant*, 964 P.2d 82 (1998). *Srader* involved suits by anti-gaming interests against non-tribal financial institutions that supported tribal gaming operations as well as state officials responsible for enforcing state gambling laws. *Id.* at 85-86. The *Srader* suits, like this action, did not directly challenge the state-tribal gaming compacts.

In *Srader*, the court ordered the dismissal of the suits for failure of the plaintiffs to join the absent tribes, which it found to be necessary and indispensable parties. Specifically, the court found the tribes to be required parties under a "functional analysis" that ignores "plaintiffs' intentions" in favor of an inquiry into whether "the subject claims, continued in the tribes' absence, as a practical matter could 'impair or

 $^{^{10}}$ As AUTO notes in its complaint, the Legislature has expressly provided the governor of Washington authority to enter into the agreements. CP at 103; RCW 82.36.450.

impede [the tribes'] ability to protect [their] interest[s]." Srader, 964 P.2d. at 89 (internal citation omitted).

The New Mexico Supreme Court then restricted *Johnson* to the narrow situations involving mandamus actions challenging "the relative authority of the executive and legislative branches of New Mexico government." *Srader*, 964 P.2d. at 91-92. The New Mexico *Johnson* decision does not assist AUTO because the Agreements at issue were authorized by the Washington legislature.

In an ironic last gasp effort, AUTO, an association of gasoline retailers, suggests that whether an absent party is necessary should be judged by whether AUTO has an altruistic or self-enriching motive in bringing its lawsuit. Br. Appellant at 20-21. The self-proclaimed altruism of AUTO is the sole basis upon which AUTO distinguishes *Matheson* and *Mudarri*. In a more candid moment, AUTO has acknowledged its competitive business motivation for trying to stop gas tax refunds to the tribes. CP at 3.

AUTO's argument cannot be squared with the plain language of CR 19(a)(2)(A) requiring the court to consider the impact of the lawsuit on the absent party. The trial court did not abuse its discretion in determining the necessity of joining the tribes by looking at the potential impact on

their contractual rights rather than evaluating the "altruism" of AUTO. See CR 19(a)(2)(A).

2. The Tribes Are An Indispensible Party That Cannot Be Joined And Therefore The Trial Court Properly Dismissed This Lawsuit

If the absent party is found to be necessary, but cannot be joined, the court must determine whether the party is indispensable and the case subject to dismissal. CR 19(b); *Matheson*, 139 Wn. App. at 634. Under CR 19(b), four factors guide the court in determining indispensability:

- (1) The extent to which a judgment rendered in a person's absence might be prejudicial to that person or those already parties;
- (2) The extent to which any prejudice can be reduced or avoided by the shaping of relief, protective provisions in the judgment, or other measures;
- (3) Whether a judgment rendered in the person's absence will be adequate; and
- (4) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

CR 19(b).

The trial court was well within established precedent in ruling the tribes were indispensable within the meaning of CR 19(b) and ordering dismissal of the lawsuit. *See Matheson* and *Mudarri*.

a. Adjudication Of This Matter In The Tribes Absence Would Be Prejudicial To The Tribes

The first factor considers the extent to which a judgment rendered in the tribes' absence might prejudice the tribes or the existing parties. CR 19(b)(1). "'[T]he first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a): a protectable interest that will be impaired or impeded by the party's absence." Wilbur, 423 F.3d at 1114 (quoting American Greyhound, 305 F.3d at 1024-25 (2002); see also Matheson, 139 Wn. App. at 635 ("any change to the Agreement would inherently prejudice the Tribe."); Dawavendewa, 276 F.3d at 1162. As discussed above, the tribes would be clearly prejudiced because AUTO's requested relief, if granted, would prevent the tribes from receiving fuel tax refunds to which they are entitled under the Agreements. The first factor thus points to the tribes' indispensability in this matter. 11

b. Prejudice To The Tribes Cannot Be Reduced By Shaping Protective Provisions In Any Judgment

The second factor is "the extent to which any prejudice could be lessened or avoided" by protective provisions in the judgment, shaping the relief, or other measures. CR 19(b)(2). Here, no "shaping" of the

AUTO argues that the tribes would not be prejudiced because its action aims only at "prohibition of the State's unconstitutional actions," and any negative impact of their requested relief on the tribes can be addressed through the dispute resolution procedures of the Agreements. Br. Appellant at 25-26. This argument is simple sophistry. The proper inquiry focuses not on what AUTO aims to prevent, but instead on the impact on the absent tribes.

judgment could mitigate the prejudice to the tribes given the relief AUTO has requested. AUTO seeks a declaratory judgment that the fuel tax remittances to the tribes are unconstitutional and an injunction prohibiting the State from providing the tribes with any such revenue. CP at 15.

Consistent with Washington law, the Ninth Circuit in *Wilbur*, faced with identical facts, reached the conclusion that (Fed. R. Civ. P. 19(b)(2)) militated in favor of dismissal on indispensability grounds. *In accord, Matheson*, 139 Wn. App. 624, and *Mudarri*, 147 Wn. App. 590, the court in *Wilbur* noted this factor favored the tribe because plaintiff "wants nothing less than nullification of the [cigarette tax agreement]. If they succeed, the Tribe will be deprived of the contractual benefits for which it bargained." *Wilbur*, 423 F.3d at 1114. As in *Wilbur*, AUTO's relief, if granted, would completely deprive the tribes of their right to a refund of the fuel tax revenues for which they bargained.

AUTO makes no argument that actually describes how a court could "shape" relief to avoid prejudice to the tribes. Rather, AUTO asserts that tribal officials who signed the agreements could be joined in this lawsuit. Br. Appellant at 26-31. However, joining tribal officials is not "shaping" relief under CR 19 (b)(2). The barrier of tribal sovereign immunity to the joinder of tribal officials is discussed in section "D" of the State's brief beginning at page 28.

c. A Judgment In The Tribes' Absence Will Not Be Adequate

The third factor, "whether a judgment rendered in the [party's] absence would be adequate," likewise does not favor AUTO. CR 19(b)(3). If the fuel tax refunds are declared illegal and the State is prohibited from making those payments to the tribes, then the tribes' interests guaranteed by the Agreements would be impaired. As was the case in *Matheson*, AUTO's requested relief essentially seeks "dissolution" of state-tribal agreement and any lesser remedy (as would be required in the absence of the tribe) will not likely be adequate to address AUTO's concerns.

A similar situation is found in *Wilbur* where the court noted that the third factor "does not favor the plaintiffs," because if the [cigarette tax agreement] is invalidated, the Tribe's 'protectible (sic) interests [under the agreement] (would be) impaired." *Wilbur*, 423 F.3d at 1114, quoting *American Greyhound*, 305 F.3d at 1025; *see also Dawavendewa*, 276 F.3d at 1162 (no partial relief adequate when "[any] type of injunctive relief necessarily results in . . . prejudice to [the absent Tribe]"); *Pit River Home* & *Agric. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1102 (9th Cir. 1994)

(adequate judgment not possible when plaintiff's claims could not be addressed without prejudicing absent party).

d. The Absence Of An Alternative Forum Does Not Preclude Dismissal of This Case

Finally, the fourth factor is "whether the Plaintiff would have an adequate remedy if the action were dismissed." CR 19(b)(4). Although the plaintiff may not have access to a judicial forum as a result of the dismissal of this action, Washington and federal cases with similar relevant facts provide that CR 19 dismissal is still appropriate. Matheson, 139 Wn. App. at 636 (citing cases). As the court of appeals noted in Matheson, "the Ninth Circuit has regularly held that the tribal interest in [sovereign] immunity overcomes the lack of an alternative remedy or forum for plaintiffs." Matheson, 139 Wn. App. at 636, citing, Wilbur, 423 F.3d at 1115; see also American Greyhound, 305 F.3d at 1025 (dismissal under Fed. R. Civ. P. 19 is a "common consequence of sovereign immunity" and "we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs."); Clinton v. Babbitt, 180 F.3d 1081, 1090 (9th Cir. 1999); Kescoli v. Babbitt, 101 F.3d 1304, 1311 (9th Cir. 1996); Pit River Home & Agric. Co-Op. Assn. v. United States, 30 F.3d 1088, 1102 (9th Cir. 1994); Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1460 (9th Cir. 1994);

Makah, 910 F.2d at 560; Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326-27 (9th Cir. 1975).

AUTO cites three cases from other states in which it claims the courts found the absence of an alternative forum factor to be dispositive and to require a finding the absent parties were not indispensable. Br. Appellant at 33-35, citing, *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474 (Wis. Ct. App. 2002); *Saratoga Cnty. Chamber of Commerce v. Pataki*, 798 N.E.2d 1047 (N.Y. App. Div. 2003); and *People ex rel. Lundgren v. Community Redev. Agency for the City of Palm Springs*, 65 Cal. Rptr. 2d 786 (1997).

AUTO's reliance on these cases is misplaced and contrary to Washington law. First, the decisions in *Dairyland* and *Saratoga* are distinguishable for the same reasons discussed above in distinguishing the New Mexico decision in *Johnson*. As in *Johnson*, *Dairyland* and *Saratoga* involved challenges to an executive's authority to enter into agreements without legislative approval. Here, in contrast, AUTO does not argue the agreements lack legislative authorization, nor would such an argument have merit. *See* RCW 82.36.450.

In addition, *Dairyland* and *Lundgren* are also distinguishable because, contrary AUTO's contention, they are not cases involving CR 19(b)(4). Rather, *Dairyland* and *Lundgren* involve misapplications of

the public rights doctrine. As explained in more detail below, the public rights doctrine provides an exception to CR 19 dismissal only when the action seeks to vindicate a public right, not a private interest. *Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992); *National Licorice Co. v. Natl. Labor Relations Bd.*, 309 U.S. 350, 60 S. Ct. 569, 84 L. Ed. 799 (1940). Furthermore, the public rights exception is not available where the relief requested would deprive the absent party of its contractual rights. *Shermoen*, 982 F.2d at 1319. As stated in *Shermoen*:

The public rights exception to joinder rules is an acceptable intrusion upon the rights of absent parties only insofar as 'the adjudication does not destroy the legal entitlements of the absent parties.'

Shermoen, 982 F.2d at 1319, quoting Conner v. Burford, 848 F.2d 1441, 1459 (9th Cir. 1988).

The courts in *Dairyland* and *Lundgren* ignored this factor in their decisions. As previously described in this case, the relief requested by AUTO would destroy contractual entitlements owed to the tribes.

Notably, Washington courts have rejected the reasoning used by the courts in *Dairyland, Lundgren*, and *Saratoga*. *See Mudarri*, 147 Wn. App. at 600. In *Mudarri*, the plaintiff made the same argument AUTO makes here: That dismissal of the action would result "in unlimited executive power free from judicial challenge." *Mudarri*, 147 Wn. App. at

600-01. The court rejected that argument, concluding after weighing all of the CR 19 factors, that the tribe was necessary and indispensable and dismissed the action. The soundly reasoned holdings in *Mudarri* and *Matheson* applying Washington law to the consequences of tribal immunity under CR 19(b)(4) and dismissing plaintiffs' cases are more persuasive than the out-of-state cases cited by AUTO.

In fact, Washington authorities are consistent with the overwhelming majority rule that the policies underlying the recognition of tribal sovereign immunity require CR 19 dismissal even though a consequence of recognizing the immunity is that judicial remedies will be unavailable in some situations. *See Hodel*, 788 F.2d at 781; *Wilbur*, 423 F.3d at 1113 (citing cases).

The holdings in *Matheson* and *Mudarri* are consistent with Ninth Circuit decisions involving the impact of tribal immunity under Fed. R. Civ. P. 19. For example, in *Wilbur v. Locke*, the plaintiffs sought to invalidate a cigarette tax agreement between the State of Washington and the Swinomish Tribe that, like the Agreements here, provided the Swinomish with tax monies that the tribe agreed to spend for essential tribal government purposes. However, the plaintiffs did not join the tribe as a party to the suit. *Wilbur*, 423 F.2d at 1105.

In holding the suit should have been dismissed pursuant to Fed. R. Civ. P. 19, the Ninth Circuit noted that the Swinomish have a legally protected interest that could be impacted by the litigation – their rights guaranteed by the agreement with the State – and they are, thus, necessary parties to the suit. *Id.* at 1112. In addition, the Swinomish could not be joined because of their immunity. *Id.* at 1114.

Finally, the court held the Swinomish Tribe was an indispensable party to the action. The tribe would be prejudiced by an adjudication of the matter in their absence, a fact which could not be avoided by shaping the relief because the relief sought by plaintiffs would entirely deprive the tribe of their contractual rights. *Id.* at 1114. And, although dismissal would mean the plaintiffs would have no adequate remedy for their complaints, "we have 'regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Id.* at 1115, quoting *American Greyhound*, 305 F.3d at 1025 (and cases cited therein).

In dismissing AUTO's suit, the trial court was simply following the clear and consistent holdings of cases like *Matheson*, *Mudarri*, and *Wilbur*. These cases are indistinguishable in all relevant respects from this matter and the trial court's rulings were well within its discretion. Although AUTO disagrees with the rulings of the trial court, it presents

neither argument nor citation to the record supporting a conclusion that the trial court abused its discretion in dismissing AUTO's case under CR 19.

D. Tribal Sovereign Immunity Bars Joinder Of The Tribes And Tribal Officials

AUTO raises two arguments in its attempt to avoid the consequences of tribal sovereign immunity, but neither argument is meritorious. First, AUTO presents an argument that waiver of tribal immunity can be inferred from dispute resolution provisions in the fuel tax agreements. Br. Appellant at 21. Second, AUTO argues that tribal sovereign immunity does not prevent tribal officials from being joined in state law actions seeking injunctive relief. Br. Appellant at 26.

Both of AUTO's arguments are deeply flawed and do not overcome the barrier posed by tribal sovereign immunity.

1. The Dispute Resolution Provisions In The Fuel Tax Agreements Do Not Waive Tribal Sovereign Immunity

Tribal sovereign immunity from both liability and suit is absolute unless expressly waived either by Congress or the Tribe. *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). Such a waiver by the tribe must be "clear" and "unequivocally expressed," and there is a strong presumption against waiver. *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991); *Santa*

Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 419 (9th Cir. 1989).

Although the tribes are necessary parties to this action joinder of the tribes is not feasible because, as sovereign nations, they are immune from suit. *Mudarri*, 147 Wn. App. at 602-03; *see also, Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 147 P.2d 1275 (2006). AUTO contends, however, that the tribes have waived their sovereign immunity. Br. Appellant at 21-24. AUTO's argument is without merit.

The language in the various Agreements on which AUTO relies for its waiver argument provides only that the parties to the Agreements – the State and the Tribes – may take any disputes between them to a court for adjudication if the informal dispute resolution processes mandated by the Agreements fail. *See e.g.*, CP at 259-60, 268-69. The language does not purport to waive tribal immunity as to any non-parties to the fuel tax agreements. The language in the Agreements does not constitute the type of clear and unequivocal waiver of sovereign immunity sufficient to overcome the presumption against such a waiver. ¹²

¹² Indeed, the case relied upon by AUTO for this point is inapposite for just this reason. Br. Appellant at 22, citing C&L Enters, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001). The issue there was limited to whether the tribe through certain contract language waived its sovereign immunity to suit by the other party to the contract. C&L cannot be read to provide any

In addition, even assuming *arguendo* that the Agreements' language relied upon by AUTO could be said to constitute a waiver, that language serves to waive the tribes' immunity only to suit by the other party to the Agreements: the State. *See, e.g., Demontiney v. United States,* 255 F.3d 801, 813-14 (9th Cir. 2001) (consent to suit by tribe for one type of claim does not open the door to suit by other claims brought by other parties). Where a tribe does, in fact, consent to suit, any conditions or limits it places on a waiver of its sovereign immunity must be strictly construed and applied. *Missouri River Serv., Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852-53 (8th Cir. 2001). As the court there explained:

Because a waiver of immunity "is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985) (quoting Beers v. Arkansas, 61 U.S. (20 How.) 527, 529, 15 L. Ed. 991 (1857)). In addition, if a tribe 'does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied.' Namekagon Dev. Co., 517 F.2d at 509.

Id. at 852.13

authority that the language in the Agreements at issue here constitutes a waiver of the tribes' immunity with regard to entities who are not parties to the Agreements.

¹³ Although AUTO argues that sovereign immunity "once waived is waived" and contends the tribes cannot be selective regarding the scope of their waiver, it fails to cite any authority for this argument. Br. Appellant at 24. There is good reason there is no such authority: It would, as *Missouri River Services* points out, run directly contrary

AUTO also argues the tribes could voluntarily join the action. Br. Appellant at 32-33. However, the tribes are under no obligation to waive sovereign immunity and join this lawsuit. *See Northern Arapaho Tribe v. Harnsberger*, 660 F. Supp. 2d 1264 at 1281 (D. Wyo. 2009) (fact that sovereign entity could have intervened but did not cannot be considered as mitigating factor weighing against the absent tribe; to do so would penalize the tribe for asserting its sovereign rights).

AUTO points to no language in the agreements constituting a broad waiver of tribal immunity. Nor does AUTO cite any language waiving immunity to lawsuits challenging the agreements, but brought by non-parties to the agreements. In light of the requirement that a waiver of tribal immunity must be "clear" and "unequivocally expressed," the failure of AUTO to identify any such language is fatal to its waiver argument. See, Wright, 159 Wn.2d at 112, citing, Santa Clara Pueble, 436 U.S. at 59.

2. Tribal Officials Are Shielded By Tribal Sovereign Immunity When Signing Government-To-Government Agreements On Behalf Of Their Respective Tribes And Cannot Be Joined As Individuals To This Lawsuit

AUTO's argument that it can cure its absent party dilemma by naming individual tribal officers stems from its misunderstanding of

to the strong policy in favor of tribal sovereign immunity and the concomitant presumption against any waiver of tribal immunity.

applicable law. *See* Br. Appellant at 26-32. At its most basic level, AUTO's error is its failure to recognize that tribal immunity is a <u>federal</u> guarantee that cannot be abridged by state laws due to the overriding nature of the supremacy clause. *Wright*, 159 Wn.2d at 112, citing, *Kiowa Tribe*, 523 U.S. at 754.

AUTO relies heavily on the decision in *Burlington Northern R.R.* v. *Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 2000) (overruled on other grounds, Big Horn Cnty. Elec. Co-op. v. Adams, 219 F.3d 944 (9th Cir. 2000)) and its progeny for its argument that tribal officials can be joined in a lawsuit seeking prospective relief. Br. Appellant at 28-31. The decision in *Blackfeet* is an extension of the *Ex Parte Young* doctrine to cases involving tribal immunity. *Blackfeet*, 924 F.2d at 901, citing, *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

Under the *Blackfeet* extension of *Ex Parte Young*, tribal officials are not immune from actions seeking to vindicate <u>federal</u> rights. *Blackfeet*, 924 F.2d at 901. This doctrine has its roots in the supremacy clause, but is inapplicable to state law claims. *Pennhurst State Sch. & Hosp. v. Holderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Green v. Mensour*, 474 U.S. 64, 69, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985). Accordingly, the cases relied on by AUTO are inapplicable because no federal claims are present in this case.

AUTO disavows any reliance on the *Ex Parte Young* doctrine for good reason – the doctrine is only applicable when a *federal* claim is at issue. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 106. The sole purpose of the *Ex Parte Young* exception is to assure federal supremacy and to ensure state and tribal officials comply with federal law. *Id.* at 105. As the Ninth Circuit explained:

The Supreme Court has recognized that the *Ex parte Young* doctrine is necessary "to permit federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States." This purpose would be undermined if state officials were not required to act consistently with federal statutes, as well as the federal constitution.

Natural Res. Defense Coun. v. California Dep't of Trans., 96 F.3d 420, 422 (9th Cir. 1996) (internal citations omitted).

AUTO attempts to side-step the inapplicability of *Blackfeet* to this case by suggesting the creation of a state law analog to *Ex Parte Young* is an open question in Washington. Br. Appellant at 30 n.16. AUTO is once again mistaken. Tribal sovereign immunity is a federally granted status and cannot be abridged by state laws. *Wright*, 159 Wn.2d at 112. Therefore a state law analog to *Ex Parte Young* could not be created and applied as a mechanism to override tribal immunity for state law claims.

In addition, Ex Parte Young is not available where, as here, the relief requested would operate against the tribe rather than the tribal

officials. *Dawavendewa*, 276 F.3d at 1161. The suit in *Dawavendewa* involved a national origin discrimination claim filed against a power plant operating on land leased from the Navajo. The lease provided a hiring preference for Navajo. Dawavendewa, who was not a Navajo, sued after he did not get a job at the plant and sought an injunction that would prohibit enforcement of the lease's hiring preference. *Id.* at 1155. He did not sue the Navajo.

As in this matter, Dawavendewa argued that even if the Navajo could not be sued because of their sovereign immunity, his action could survive CR 19 by substituting Navajo officials as defendants. *Id.* at 1159. The Ninth Circuit rejected his argument, noting in its analysis that such an argument "strikes us as an attempted end run around tribal sovereign immunity." *Id.* at 1160. The court held that prior cases applying *Ex Parte Young* never "insinuated that a plaintiff may circumvent the barrier of sovereign immunity by merely substituting tribal officials in lieu of the Indian Tribe." *Id.* Discussing one of these prior cases, in which the plaintiffs attempted to use the same "ploy," the court concluded that the exception for suits against tribal officials does not apply where the relief sought would operate against the tribe:

Undoubtedly many actions of a sovereign are performed by individuals. Yet even if Dawavendewa alleged some wrongdoing on the part of [Navajo] Nation officials, his

real claim is against the Nation itself. At bottom, the lease at issue is between the [the power plant] and the Nation, and the relief Dawavendewa seeks would operate against the Nation as signatory to the lease. As such, we reject Dawavendewa's attempt to circumvent the Nation's sovereign immunity by joining tribal officials in its stead.

Id. at 1160, 1161; *see also Pennhurst*, 465 U.S. at 101-02 (if relief sought will operate against the sovereign, the suit is barred).

Like Dawavendewa's requested relief, AUTO's requested injunction would operate to deprive the tribes of their contractual rights to a portion of the fuel tax revenues. As such, AUTO cannot avoid application of CR 19 by including tribal officials as defendants.

The cases cited by AUTO in support of its attempt to name individual tribal members are all distinguishable. For example, AUTO argues that tribal officials can, in fact, be sued individually for violating state law, relying on *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 171, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977) (*Puyallup II*) and *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 391 U.S. 392, 88 S. Ct. 1725, 20 L. Ed. 2d 689 (1968) (*Puyallup II*). Br. Appellant at 26-30.

In those cases, the Supreme Court held that tribal members acting in their individual capacities could be prosecuted in state court for violating state conservation laws designed to prevent overfishing. Puyallup II, 433 U.S. at 171-72. However, AUTO does not seek to sue the tribal officials in their individual capacity. Rather, AUTO wants to join the tribal officials in their representative capacity for entering into government-to-government Agreements on behalf of their respective tribes. Br. Appellant at 26 (tribal officials could be joined as defendants to represent the tribes' interests). As a result, the Puyallup cases are simply inapposite. Accord, Blackfeet, 924 F.2d at 902 n.4; Romanella v. Hayward, 933 F. Supp. 163, 167 (D. Conn. 1996); Thompson v. Crow Tribe, 962 P.2d 577, 581-82 (Mont. S. Ct. 1998).

In *Thompson*, the Montana Supreme Court rejected an identical argument to that made by AUTO. In that case, the plaintiff, Thompson, attempted to bring an action in state court against a tribe to cancel tax liens the tribe had filed against Thompson's business. Thompson, relying on *Puyallup II*, argued that even if the tribe was immune, the tribal officials who filed the liens were not. *Thompson*, 962 P.2d at 581. The court rejected this attempted use of *Puyallup II* and concluded that tribal officials retain the tribe's immunity so long as they are acting in their representative capacity:

Puyallup simply held that tribal sovereign immunity did not protect individual tribal members from state court process in connection with fishing activities conducted by such members off the reservation. The Court did not address the fundamentally different issue of the applicability of tribal

sovereign immunity to persons acting as officials or agents of the tribe in the conduct of the tribe's business off the reservation. . . . When tribal officials act in their official capacity and within the scope of their authority they are immune.

Id. at 582 (internal citation omitted);¹⁴ accord, Romanella, 933 F. Supp at 167 (where plaintiff fails to even allege the tribal official acted beyond the scope of the official's authority, an action against the official is an action against the tribe and the individual's immunity is coextensive with the tribe's immunity).

AUTO's reliance on *Nisqually Indian Tribe v. Gregoire*, No. 08-5069, at *5-6, 2008 WL 1999830 (W.D. Wash. May 8, 2008) is also misplaced. Br. Appellant at 29. The plaintiff there raised both federal and state law claims. Unlike this case, which involves only state law claims, the presence of the federal claims in *Nisqually* permitted the plaintiff to invoke *Ex Parte Young* and join as a defendant a tribal official in his representative capacity. *Nisqually* at *5-6. As the court stated:

Because Nisqually has alleged in its proposed amended complaint that Chairman Peter's actions are a continuing violation of **federal** law, the Court agrees that *Ex parte Young* can be invoked, and tribal sovereign immunity does not shield Chairman Peters from suit.

AUTO also cites *Matheson* in its discussion of the *Puyallup* cases and contends *Matheson* endorsed its reading of those cases. Br. Appellant at 27-28. However, AUTO's quote from *Matheson* fails to include that court's acknowledgement that "tribal sovereign immunity continues to protect individual tribal officials acting in their representative capacity and within the scope of their authority." *Matheson*, 139 Wn. App. at 633.

Nisqually at *5 (emphasis added).

Finally, AUTO cites *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003), in support of its argument that the "State cannot claim sovereign immunity to avoid a declaratory judgment action alleging that it has violated its own laws." Br. Appellant at 30-32. However, that case is easily distinguished and actually undermines AUTO's position.

Braam arose in the context of state and federal constitutional claims on behalf of children in the state's foster care system. Braam, 150 Wn.2d at 690. The basis for the injunction against the state employee in Braam was a federal substantive due process claim, not a state law claim. Braam, 160 Wn.2d at 693. The absence of any federal claims in this case precludes the joinder of tribal officials under the Ex Parte Young/Braam exception. Further, the state, unlike the tribes, has waived sovereign immunity to the state law claims. See RCW 4.92.090.

3. The Motion To Amend Complaint Was Futile And Therefore Properly Denied

The trial court denied AUTO's motion to amend the complaint to name tribal officials as defendants on the basis that the motion was futile due to immunity of the tribes. CP at 369-70. This court reviews the trial court's denial of a motion to amend under the manifest abuse of discretion standard. Herron v. Tribune Publishing Co., Inc., 108 Wn.2d 162, 165,

736 P.2d 249 (1987). A trial court does not abuse its discretion in denying a motion to amend when the grounds supporting the amendment are futile. *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 339, 229 P.3d 893 (2010).

AUTO's motion to amend its complaint to name individual tribe members was based exclusively, on its argument from *Blackfeet* to *Puyallup*. The merits of those arguments have been addressed above. The trial court did not abuse its discretion in finding the motion to amend to be futile on the basis that tribal officials excluding government-to-government agreements remain within the scope of tribal sovereign immunity. *See Wright*, 159 Wn.2d at 112.

E. The Public Rights Exception Does Not Apply In This Case

Finally, AUTO argues that because its suit asserts public rights, CR 19 should not be applied to dismiss its action. Br. Appellant at 37-41. However, as demonstrated below, the trial court correctly ruled that AUTO's case does not fall within the narrow public rights exception.

The public rights doctrine creates an exception to dismissal under CR 19 where: (1) The suit transcends the private interests of the plaintiff and seeks to vindicate a public right; but only when (2) The suit would not "destroy the legal entitlements of the absent parties." *Wilbur*, 423 F.3d at 1115 (citation omitted). First and foremost, the public rights doctrine

does not apply for the simple reason that AUTO's requested relief would "destroy" the absent tribes' contractual rights to the fuel tax proceeds. This interest alone was sufficient for the court in *Wilbur* to hold the public rights doctrine inapplicable. *Wilbur*, 423 F.3d at 1115 ("Tribe would lose valuable contractual benefits if the [cigarette tax] Compact was held invalid. This threat to the Tribe's contractual interests precludes application of the public rights exception.").

In addition, AUTO's claim also fails because of its private interest remedying what it perceives is an unfair advantage held by competitor tribal fuel retailers. AUTO's parochial business interest is similar to that which the court in *American Greyhound* held was insufficient to invoke the public rights doctrine. *American Greyhound*, 305 F.3d at 1025-26.¹⁵

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm the trial court's dismissal of AUTO's Complaint.

¹⁵ The State's brief at pp. 24-25 distinguishes the three foreign public rights cases cited by AUTO.

RESPECTFULLY SUBMITTED this 21 day of June, 2011.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on the date below *Respondents' Brief* and this *Certificate of Service* were mailed to the Washington State Supreme Court via U.S. mail, postage prepaid, as follows: Washington State Supreme Court, P. O. Box 40929, Olympia, WA 98504.

And that I served a copy of *Respondents' Brief* and this *Certificate* of *Service* on counsel for Appellant at the address below by U.S. Mail, and by e-mail as a PDF attachment:

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DATED this $2 \frac{1}{2}$ day of June, 2011, at Tumwater, Washington.

JORDAN